

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

74-1573

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

H. PERINE,

Plaintiff-Appellant,

vs.

WILLIAM NORTON & COMPANY, INC., WILLIAM
NORTON, ELINORE NORTON and DESIGNCRAFT
JEWEL INDUSTRIES, INC.,

Defendants,

WILLIAM NORTON & COMPANY, INC.,

Defendant-Appellee.

*On Appeal from United States District Court for the Southern
District of New York.*

PETITION FOR REHEARING

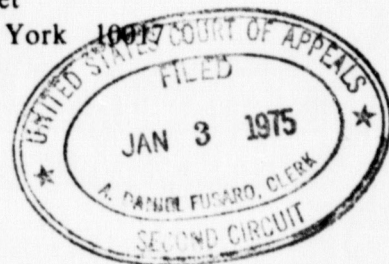
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Statutes Cited:

Securities Exchange Act of 1934:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

H. PERINE,

Plaintiff-Appellant,

-against-

Civil Action
No. 74-1573

WILLIAM NORTON & COMPANY, INC.,
WILLIAM NORTON ELINORE NORTON and
DESIGNCRAFT JEWEL INDUSTRIES, INC.,

Defendants,

WILLIAM NORTON & COMPANY, INC.,

Defendant-Appellee

On Appeal from United States District
Court for the Southern District of
New York

- - - - -X

PETITION FOR REHEARING

PRELIMINARY STATEMENT

William Norton & Company, Inc. ("Norton & Co."),
defendant-appellee, petitions for rehearing pursuant to
Rule 40 of the Federal Rules of Appellate Procedure on the
ground that the portion of this Honorable Court's Opinion
remanding this case to the District Court was based solely
upon an issue of fact raised for the first time by the

Securities and Exchange Commission ("Commission") in its amicus curiae brief and urged by plaintiff-appellant, H. Perine ("Perine") for the first time in his brief submitted in answer to said Commission's brief.

STATEMENT OF FACTS

This action was commenced by Perine on behalf of Designcraft Jewel Industries, Inc. ("Designcraft") to recover alleged insider's short-swing profits pursuant to Section 16(b) of the Securities Exchange Act of 1934 ("§16(b)"). The sole issue raised by Perine in the District Court was whether Norton & Co. should disgorge commissions earned as underwriter in the Designcraft public offering by reason of Norton & Co.'s alleged failure to comply with the third condition of the underwriter's exemption from §16(b) coverage. Commission rule 16b-2(a)(3), as the same was interpreted by Perine.

Relying solely on Norton & Co.'s alleged failure to qualify for the underwriter's exemption Perine moved the District Court for summary judgment on his complaint. Norton & Co. cross-moved for summary judgment maintaining alternatively, that §16(b) did not apply to its participation in the Designcraft underwriting or if §16(b) was applicable, then

Norton & Co. was exempt by reason of Rule 16b-2.

District Judge Robert Ward denied Perine's motion and granted Norton & Co.'s cross-motion dismissing the complaint on the merits.

Perine instituted the within appeal and maintained in his brief and reply brief that the sole basis for Norton & Co.'s alleged liability was its failure to comply with Rule 16b-2(2)(3). Annexed to Perine's main brief as Appendix D was the Commission's order for public proceedings in the Matter of William Norton & Company, Inc., et al., which order was issued by the Commission on April 2, 1974, some two weeks after the District Court filed its Opinion dismissing the complaint. It is significant to note that Perine refused or neglected to move the District Court for reargument of his motion for summary judgment based on the Commission's order for public proceedings which Perine now claims is so relevant. Perine had the full measure of time to make such a motion since notice of entry of the District Court's order and judgment was not filed until April 9, 1974.

Appendix D was included in Perine's brief for the purpose of attempting to establish that Norton & Co. had in

fact abused inside information allegedly obtained through its role as underwriter. (See pages 6,13 and 15 of Perine's brief). Nowhere in Perine's brief or reply brief, and at no time during oral argument did Perine allege bad faith participation by Norton & Co. in the Designcraft underwriting. It was not until the Commission submitted its amicus curiae brief pursuant to the Court's request that the issue of good faith participation in the Designcraft underwriting was raised. (See Securities and Exchange Commission's brief, footnote 8, pp.8 and 9). Thereafter, Perine filed a brief in answer to the Commission's amicus curiae brief wherein Perine adopted the suggestion that Norton & Co. did not participate in the Designcraft distribution in good faith and urged for the first time that §16(b) liability be predicated upon Norton & Co.'s alleged failure to act in good faith.

On page 951 of this Court's Opinion it was acknowledged that Perine did not previously allege lack of good faith on the part of Norton & Co. but, nevertheless, this Court decided to remand the case to the District Court to determine whether Norton & Co. participated in the Designcraft underwriting in good faith to resolve whether Norton & Co. was exempt from §16(b) by reason of Rule 16b-2(a)(1).

ARGUMENT

SINCE THE QUESTION WAS NOT RAISED IN THE DISTRICT COURT AND WAS NOT RAISED IN APPELLANT'S BRIEF, OR DURING ARGUMENT IT WAS IMPROPER FOR THIS COURT TO CONSIDER THE ISSUE OF NORTON & CO.'S GOOD FAITH PARTICIPATION AND TO REMAND FOR FURTHER FINDINGS REGARDING THE SAME.

Generally, Appellate Courts will refuse to consider issues which are raised for the first time on appeal. Hormel v. Helvering, 312 U.S.552,556, 61 S.Ct. 719, 85 L.Ed.1037; Terkildsen v. Waters, 481, F.2d 201, 204-5 (2d Cir.1973); List v. Fashion Park, Inc., 340 F.2d 457, 461 (2d Cir.1965); Calhoun v. Freeman, 316 F.2d. 386,388 (D.C.Cir. 1963.) Certainly, when a question is raised for the first time after argument has been heard and appellee has no opportunity to address itself to that issue an appellate court should decline to consider the same. Palmer v. Reconstruction Finance Corporation, 164 F.2d. 466,468 (2d Cir.1947).

Occasionally, when a question raised for the first time on appeal has great significance and is of general importance the appellate court will consider it. Krause v. Sacramento Inn, 479 F.2d. 988 (9th Cir.1973); Green v. Brown, 398 F.2d.1006,1009 (2d Cir.1968). However, when the newly presented question is one of fact and not law the appellate court should turn it aside. List v. Fashion Park, Inc., supra, p.461; Bartlett-Collins Company v. Surinam Navigation Company, 381 F.2d 546,550 (10th Cir. 1967).

It is unequivocally manifest that the question of

Norton & Co.'s good faith participation in the Designcraft underwriting was not raised in the District Court. Furthermore, it is equally clear that this question was not raised in Perine's briefs nor was it raised until the submission of the Commission's amicus curiae brief after argument had been heard by the Court. Plainly, Norton & Co. was not given an opportunity to be heard in any manner on this question. Additionally, the question raised is a factual one with little, if any, significance beyond this immediate lawsuit and of no general importance.

Norton & Co.'s lack of opportunity to respond is of considerable moment here inasmuch as this Court's opinion, at page 951, appears to rely on Perine's contention that the SEC's administrative proceedings filed against Norton & Co. will establish Norton & Co.'s lack of good faith participation in the Designcraft underwriting. This cannot be so because the Commission has de facto terminated the administrative proceedings by permitting Norton & Co. to withdraw its broker-dealer registration, effective on or about March 16, 1974, thereby divesting itself of any jurisdiction it may have had over Norton & Co. The subsequent order of public proceedings dated April 2, 1974, was jurisdictionally defective. The Commission has informally acknowledged this fact and has constructively terminated its proceedings by its failure to commence any action as ordered approximately nine months ago. Considering the defective nature of the administrative proceedings filed against Norton & Co.

it was somewhat disingenuous of the Commission to include Footnote 8 in its brief referring to the institution of administrative proceedings against Norton & Co. and raising the question of good faith participation in the Designcraft offering.

By reason of his failure to move for reargument in the District Court after the Commission ordered public hearings Perine has waived any right he may have had to raise new factual questions after this appeal was argued.

CONCLUSION

For these reasons it was improper for this Court to consider the newly raised question and to remand to the District Court for a determination of the same. Accordingly, petitioner, William Norton & Company, Inc., respectfully requests that this Court grant the petition for rehearing and that the judgment of the District Court, upon further consideration, be affirmed in toto.

Respectfully submitted,

FELDSHUH & FRANK

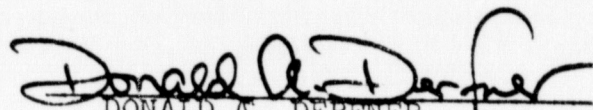
Donald A. Derfner,
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

New York, New York

January 2, 1975.


DONALD A. DERTNER
Attorney for Petitioner

US COURT OF APPEALS: SECOND CIRCUIT

PERINE,
Plaintiff-Appellant,

- against -

NORTON, et al,
Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

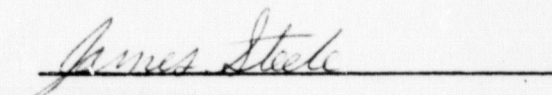
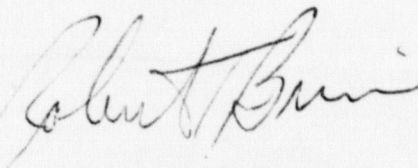
ss.:

I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 3rd day of January 1975 at 41 E. 42nd Street, New York

deponent served the annexed Petition upon

Kaufman, Taylor, Kimmel & Miller
in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 3rd
day of January 1975


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975